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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002000-ME

D.L. AND K.L. APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY COURT DIVISION NINE
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 10-J-500496

COMMONWEALTH OF KENTUCKY;
C.L., THE MINOR CHILD REPRESENTED BY HIS GUARDIAN AD LITEM, JOSEPH ELDER II; AND
CABINET FOR HEALTH AND FAMILY SERVICES APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, TAYLOR AND VANMETER, JUDGES.

TAYLOR, JUDGE: D.L. and K.L. appeal from an order of the Jefferson Circuit Court, Family Court Division Nine, entered October 4, 2011, finding that their child, C.L., was abused.

C.L. was born on September 21, 2007. Appellants served as his foster parents after he was removed from his mother shortly after his birth; her parental rights were subsequently terminated, and appellants adopted him through a Cabinet adoption.

On March 19, 2010, an emergency custody order was entered placing the child in the custody of the Cabinet for Health and Family Services (Cabinet). The Cabinet filed a juvenile dependency, neglect and abuse (DNA) petition, alleging that appellants had neglected and abused their son by using inappropriate forms of discipline which included forcing him to drink apple cider vinegar repeatedly until he vomited fourteen times and aspirated. The father, D.L., admitted that he went to Kroger to call poison control on the night of the incident so that his phone number could not be traced. The child was ultimately admitted to the hospital for treatment. On October 6, 2010, the assistant county attorney assigned to the case entered into an informal adjustment agreement with appellants. The family court judge entered the order adopting the agreement, noting that it was entered over the objection of the child's *guardian ad litem*.

On October 18, 2010, in-house counsel for the Cabinet filed a motion to alter, amend or vacate the order, alleging that the assistant county attorney had entered into the adjustment agreement without the Cabinet's consent. The Cabinet's caseworker attached an affidavit stating that she had not received appellants' motion to informally adjust the petition until after the motion had already been heard. She further swore that she had previously informed the

assistant county attorney that the Cabinet did not agree to an informal adjustment of the DNA action, and that her request to have the case re-docketed to allow the family court to consider her objection to the informal adjustment was denied by the county attorney's office.

At the hearing on the Cabinet's motion, the assistant county attorney admitted that the caseworker was not in court when the agreed order was entered, and that her consent to the agreement had not been obtained. Over appellants' objection, the trial court granted the Cabinet's motion and vacated the order of informal adjustment. Following an adjudication hearing, the trial court found that the child was abused as a result of appellants continuing to administer cider vinegar as a method of discipline. This appeal follows.

Appellants raise three allegations of errors: (1) that the trial court erred in entertaining the Cabinet's motion and setting aside the agreement; (2) that the Commonwealth is bound by the terms of its agreement of informal adjustment; and (3) that the Commonwealth failed to prove the statutory elements necessary for a finding of abuse under Kentucky Revised Statutes (KRS) 600.020(1).

Appellants argue that in granting Cabinet counsel's motion to alter, amend or vacate, the trial court erroneously allowed the Cabinet to represent the Commonwealth, when in fact the Commonwealth was already represented by the county attorney. They argue that the trial court's actions led to a dual representation and lack of clarity as to who was prosecuting the action. They contend that the Cabinet should not play a role in the formal litigation process, in

part because the Cabinet is not financially or logistically capable of such an undertaking in every dependency proceeding. They equate the role of the Cabinet personnel to that of the police in a criminal prosecution, that is, to serve primarily as investigators and witnesses.

Our case law unequivocally states that the Cabinet is a party in dependency proceedings, and that its role extends far beyond the initial filing of the DNA petition. In *Commonwealth, Cabinet for Health and Family Services v. Byer*, 173 S.W.3d 247 (Ky. App. 2005), this Court stated that "when the Cabinet files a dependency action, 'the Cabinet is in fact the plaintiff.'" *Id.* at 249 (quoting *Cabinet for Human Resources v. Howard*, 705 S.W.2d 935, 937 (Ky. App. 1985)). The Court noted that the Cabinet was required to have a representative at the custody hearings, to monitor the child's environment, to assess the parents' parenting skills and to report to the court on the parties' progress. It concluded that the Cabinet was more than a "nominal" party. *Id*.

KRS 600.020(32) defines an "informal adjustment" as:

> [A]n agreement reached among the parties, with consultation, but not the consent, of the victim of the crime or other persons specified in KRS 610.070 if the victim chooses not to or is unable to participate, after a petition has been filed, which is approved by the court, that the best interest of the child would be served without formal adjudication and disposition[.]

In this case, neither the Cabinet nor the *guardian ad litem* (who is also indisputably a party) agreed to the terms of the informal adjustment before it was

presented to the court. The requirements of the statute were not met; under these circumstances, the trial court did not err in vacating the earlier order.

Appellants further argue that the Commonwealth is "bound" by the informal adjustment agreement, just as the Commonwealth would be held to the terms of a plea bargain in a criminal case. An informal adjustment is neither an adjudication nor disposition "[w]hile the conditions are pending, the matter is simply in abeyance. . . . At no point is there a final action by the district court; there is rather a decision not to act." *Com. v. C.J.*, 156 S.W.3d 296, 298 (Ky. 2005). In addition to the fact that the informal adjustment was invalid because the statutory requirement of agreement amongst the parties had not been met, these proceedings are a civil action in which the best interest of the child, not the adjudication of guilt and determination of a penalty, remains the paramount issue. Under these circumstances, the informal adjustment was not binding on the Commonwealth or the trial court.

Finally, appellants argue that the Commonwealth failed to prove the statutory elements necessary for a finding of abuse under KRS 600.020(1). That statutory provision defines "abused or neglected child" as:

> [A] child whose health or welfare is harmed or threatened with harm when:
>
> (a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:

> 1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
>
> 2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means[.]

KRS 600.020(1).

Physical injury is defined as "substantial physical pain or any impairment of physical condition[.]" KRS 600.020(46).

"The trial court has broad discretion in determining whether a child fits within the abused or neglected category[.]" *C.R.G. v. Cabinet for Health and Family Servs.*, 297 S.W.3d 914, 916 (Ky. App. 2009). "The burden of proof shall be upon the complainant, and a determination of dependency, neglect, and abuse shall be made by a preponderance of the evidence." KRS 620.100(3).

The trial court found that the child was abused "as a result of the parents' actions of continuing to administer vinegar after the child vomits, and ultimately [the] child had to go to the hospital to be treated for having aspirated the vomit."

Appellants do not deny that vinegar was administered to the child as a means of discipline, but that the amounts of vinegar administered to the child were greatly exaggerated and that the aspiration was simply an accident. They contend that aspiration can happen to anyone if a fluid such as juice or water "goes down the wrong way." They assert that the Commonwealth failed to prove that the

health or welfare of the child was ever harmed or threatened with harm by his parents.

The Cabinet's investigative worker, Roy Hardy, testified that appellants first took the child to his pediatrician, who determined that the child had aspirated and referred them to Kosair Children's Hospital, where he was subsequently treated. Hardy testified that the medical records showed that appellants told hospital staff that they had only administered .4 milliliters of vinegar, whereas they told him they had administered the vinegar fourteen times and that the child had vomited fourteen times. Hardy also testified that appellants told him they went back to using vinegar to discipline the child a month after he was taken to the hospital for its previous use. Hardy also testified that the medical records showed the child was nineteen months old at the time and weighed twenty-four pounds.

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure 52.01. Even under the "clear and convincing" standard required for a termination of parental rights, uncontradicted proof is not required. "It requires that there be proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinary prudent-minded people." *C.R.G.*, 297 S.W.3d at 916 (Ky. App. 2009).

Hardy's testimony that appellants administered vinegar repeatedly to a very young child until he vomited, and continued the practice after he had to be treated at the hospital for aspiration, provided more than sufficient evidence to support the trial court's finding of abuse.

For the foregoing reasons, the October 4, 2011, order of the Jefferson Circuit Court, Family Court Division Nine, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

John H. Helmers, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEE, COMMONWEALTH OF KENTUCKY:

Jack Conway
Attorney General

David A. Sexton
Special Assistant Attorney General
Louisville, Kentucky

BRIEF FOR APPELLEE, THE MINOR CHILD, C.L.:

Joseph S. Elder II, *Guardian Ad Litem*
Louisville, Kentucky

BRIEF FOR APPELLEE, CABINET FOR HEALTH AND FAMILY SERVICES:

G. Thomas Mercer
Louisville Kentucky